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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 486

JOS. SCHLITZ BREWING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

OPPOSITION OF JOS. SCHLITZ BREWING COMPANY TO MOTIONS TO AFFIRM

The separate motions to affirm filed by the United States and General Brewing Corporation do not dispel the substantial and novel questions presented by this appeal. On the contrary, the strained and dissembling arguments advanced by the motions highlight the need for a decision by this Court on important issues affecting the administration of Section 7 in the public interest.

I.

The Substantial Questions Arising From Unconditional Divestiture Of The Labatt Shares Are Unresolved.

Evidently realizing that unconditional divestiture of the Labatt shares is punitive and needless, the motions to

affirm seize the trial judge's insinuation, which was not given the dignity of being made a finding, that he was "not convinced . . . Schlitz had no desire to control General Brewing." The record, however, not only exposes the striking lack of any just basis for unconditional divestiture, but *affirmatively refutes* any notion that "Schlitz may well have sought control of Labatt with an eye to its obtaining control of General Brewing." (Gov't Mot. pp. 5-6, 15; Gen. Br'g Mot. pp. 8-11)

It was uncontroverted below and is incontrovertible now that Schlitz purchased a controlling stock interest in Labatt because American brewers cannot otherwise practicably enter the Canadian beer market. At no time was Schlitz out to snare General Brewing. Equally certain, Schlitz at all times proposed the sale of Labatt's holdings in General Brewing — both before and after it purchased the Labatt shares.*

Indeed, the trial court itself elicited the decisive testimony from witnesses adverse to Schlitz, who had participated in the negotiations and who were openly opposed to Schlitz's entry into Canada. For example, in questioning John H. Moore, president of Labatt, the court asked:

> THE COURT: You never heard any Schlitz representative evidence any interest in Schlitz' continuing to hang on to and operate General Brewing, is that right?
>
> THE WITNESS: That's correct, Your Honor.

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* As detailed in the jurisdictional statement (pp. 6-7), Schlitz was unsuccessful in trying to effect a sale of General Brewing before purchasing the Labatt shares. Having agreed to pay a premium over the market price in order to gain control of Labatt, which General Brewing somehow finds sinister (Mot. p. 9), Schlitz did not accede to Labatt management's insistence that it absorb the entire and substantial loss on Labatt's investment in General Brewing. (Tr. 719-20, 822, 1036)

THE COURT: All right. (Tr. 823; see also Tr. 719-20, 812-22, 867-68, 1972-74)*

After having similarly examined other witnesses adverse to Schlitz and exhausted the possibilities for impeaching Schlitz as to its purpose in acquiring control of Labatt (*ibid.*), the trial judge observed:

> I think, in part, at least, if not perhaps in large part, that it was the Court who lead inquiry about what was said by and on behalf of the Schlitz representative. It seemed to me, unless counsel have a different view of it, so far as what was elicited by the Court the record would indicate that no representative of Schlitz, so far as any of the testimony now in the record is concerned, evidenced any infterest in General Brewing save as a problem attending the acquisition, and evidence[d] no interest, that I can recall, in continuing the operations of General Brewing. (Tr. 1034-35)

Subsequently, after having heard the corroborating testimony of Schlitz's representatives (Tr. 1035-38, 1059, 1259-65), government trial counsel straightforwardly acknowledged: "It seems to me that Schlitz' position was very well known from the day that they bought it, that they wanted the [Labatt] Board of Directors to get rid of General. This was communicated many times, and there has been testimony in this case about it." (Tr. 1972) What is more, the government proposed no findings to the contrary, nor did it controvert in any way Schlitz's proposed findings that it had no interest in General Brewing.

Rather, the government proposed, and the trial court

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* Mr. Moore, again in response to questions put by the court, further testified that the assets of General Brewing did not enter into any of the negotiations concerning the price to be paid by Schlitz for the Labatt shares. (Tr. 820)

ultimately adopted, the premise that the Labatt-General Brewing nexus must be preserved intact, ostensibly to ensure General Brewing's touted eastward expansion, in spite of its pronounced decline and partial dismemberment while under Labatt's sway. On that flimsy basis, unconditional divestiture of the Labatt shares was ordered. (Juris. St. pp. 16a, 47a-48a)

Such a decree not only far exceeds the trial court's adjudication of illegality, but is totally unnecessary as a measure to mend any competitive impairment found by the court. It also effectively bars Schlitz from entering the Canadian beer market and may well consign General Brewing to competitive oblivion.* All of these defects would be resolved by a decree that orders divestiture only in the event Schlitz is unable to bring about a sale of Labatt's holdings in General Brewing.

Pushing the trial court's groundless remark one illogical

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* At page 7 of its motion to affirm, General Brewing announces the beginning of "a return to its former dominant market position" and points to a first half profit exceeding $900,000 as compared to an operating loss of more than $500,000 for the comparable period in 1965. Of a piece with the rest of its not-of-record assertions, General Brewing neglects to tell the Court that it will incur a substantial operating loss for the entire year and that the profit recorded in the first half of 1966 results solely from a capital gain attending the sale of its Azusa brewery.

The papers General Brewing has filed in this Court, enriched as they are with colorful and extraneous charges, suggest that its malaise goes very deep indeed. Among other examples, General Brewing has gone outside the record to reproduce a telegram in its objections to the amicus brief (p. 9), apparently for the purpose of showing that Schlitz is party to an illicit deal. Perhaps General Brewing is not aware that a reply exists and that Lyle Jones, head of the Antitrust Division's San Francisco office, was advised of the entire episode. (See Appendix for text of reply.)

step further, General Brewing rails that Schlitz purchased the Labatt shares "to injure General Brewing as a competitor of Schlitz." (Mot. p. 16) Just why Schlitz would injure a company in which it had the largest beneficial interest is difficult to fathom, particularly since General Brewing simultaneously claims that Schlitz really sought to control it. (Gen. Br'g Mot. pp. 8-11)* But more important than these conflicting contentions is the undeniable fact that a sale of General Brewing would not only obviate any conceivable objection to Schlitz's continued ownership in Labatt, but would make a positive contribution to competition by freeing General Brewing of Labatt. Any concern that the disposition of Labatt's holdings in General Brewing might harm the latter or create a new problem under Section 7 is more imaginary than real, since the sale would be appropriately supervised by the government and the court.**

The other arguments of the motions to affirm are untenable or largely answer themselves: (1) Thus, the government insists there are "five different ways" in which Schlitz might enter the Canadian market other than by

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* In the same fashion, General Brewing's motion to affirm twice notes that the decree attached to Schlitz's proposed findings of fact and conclusions of law "made no suggestion of a conditional decree of divestiture." (Mot. pp. 10 n. 39, 27 n. 87) General Brewing would have been somewhat more candid with the Court if it had noted instead that such a solution was repeatedly proposed by Schlitz—at pre-trial (*e.g.*, Tr. 10-11, May 19, 1965), in Schlitz's pre-trial brief (pp. 2, 6, 12, 26-8), in its motion to dismiss made at the close of the government's case-in-chief (Tr. 874-83), in its post-trial brief (pp. 24-5, 29), and in its reply brief (pp. 14-5).

** As exemplified by the amicus brief, the district court failed to recognize that when General Brewing speaks Labatt is actually doing the talking, with the result that the best interests of General Brewing have also been lost in the shuffle.

purchasing control of Labatt. (Gov't Mot. p. 15) It states that the testimony on this score was "undisputed" (*ibid.*), notwithstanding extensive oral and documentary evidence to the contrary. (*E.g.*, Tr. 728-30, 1010-11, 1015-17, 1026-31, 1078-80, 1097-1100, 1102, 1113-14, 2001-02, 2005-06, 2008-10, 2022-28, 2029-33, 2036-38; DSX 197) What the government fundamentally ignores, however, is that American brewers have not been able to enter the Canadian beer market by any means—even though they have tried and even though Canada is their nearest foreign market. (*Ibid.*) Testimonial quibbles aside, this is plainly the most persuasive, and indeed irrefutable, kind of evidence. Besides, the government conveniently overlooks the trial court's failure, in this one instance, to adopt any of its proposed findings respecting the claimed ease of entry into Canada. As a matter of cold fact, trade barriers and various forms of parochialism, fostered by governmental policies, frustrate entry into this foreign market. (Juris. St. pp. 6-7)

(2) At no time, until now, has the "potential competition" of Labatt in the United States been argued to invalidate Schlitz's purchase of the Labatt shares. Indeed, government counsel announced below that the thought had not occurred to him. (Tr. 18, May 19, 1965) And General Brewing's president testified at trial that he could see no threat to competition if Schlitz owned Labatt free from General Brewing. (Tr. 492-93) Above all, the trial court's findings in this connection are carefully limited to the possible curtailment of the "potential competition" of General Brewing, as might be aided by the backing of Labatt. (Juris. St. pp. 16a-17a) This promised aid, which seldom materialized or fizzled when it did, could obviously come from other sources. As the court below itself once asked: "What is so magic about Canadian suport?" (Tr. 12, May 19, 1965) Moreover, the government distorts the record when it says that the

introduction of the Labatt brand of beer by General Brewing in 1964 demonstrates Labatt's intention to participate more fully in the American market. (Mot. p. 7)* Officers of Labatt testified that the introduction of "Labatt" by General Brewing was not their idea or even one they encouraged. (Juris. St. p. 16a) At any rate, the venture flopped and is now being abandoned. (See Amicus Br. p. 3) Even as emanating from General Brewing, "potential competition" of this sort hardly merits serious pause. This Court's decisions make clear that potential competition deserving consideration in Section 7 cases must be made of hardier stuff. *United States* v. *Continental Can Co.*, 378 U.S. 441, 458 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174-75 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 661 (1964).

(3) Surely the motions to affirm can gain no comfort from this Court's decision in the *du Pont* case. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). That decision, which held that the undoing of an acquisition violative of Section 7 is a natural remedy, did not bestow unrestrained authority on district courts to order divestiture of non-offending and distinct parts of a transaction, nor did it endorse punitive decrees in the guise of restoring competition. And as this Court declared in *International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959): "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court." Plenary review is especially appropriate here since the trial court entered a decree that not only promises the continued attrition of General Brewing,

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* Labatt's own sales in the United States are minuscule, totaling less than 39,000 barrels in 1963. (Juris. St. p. 6 fn.; DSX 189)

but also deprives Schlitz of any opportunity to compete in Canada. The cardinal issue is the extent to which an antitrust decree may shelter a monopoly-minded foreign market. Compare *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). If either Section 7 of the Clayton Act or the discretion of district courts in formulating antitrust decrees is to be construed to sanction results of this kind, only this Court should render such a far-reaching pronouncement.

II.

The Conflicts Respecting The Consequences Under Section 7 Of Antitrust Division Clearance And Declining Market Share Are Substantial And Merit Resolution By This Court.

Although conceding the Antitrust Division told Schlitz in 1961 that it was not prepared to take any action to block the proposed acquisition of Burgermeister's assets, the government nonetheless insists "no 'clearance' of any sort" was given, because none was asked for or memorialized in writing. (Gov't Mot. pp. 4, 16-7) Yet the current head of the Antitrust Division has stated publicly that oral statements of no present intention to sue contain "substantially everything we would say in a written letter." 30 A.B.A. Section of Antitrust Law 100, 120 (1966). Allowing the government to have it both ways, it is still inescapable that Schlitz's acquisition of the Burgermeister assets was evaluated as to its probable competitive effects under Section 7 before the transaction was consummated, and, on the basis of that evaluation, the government elected not to file suit or even warn Schlitz that it would proceed at its peril.

What weight should be given to such clearances is an issue deserving plenary consideration by this Court. For the government's puzzling inconsistencies regarding this matter indicate a loose and undiscerning enforcement of

Section 7, which can easily overstep the congressional intent so as to thwart rather than promote over-all antitrust objectives. As we suggested in the jurisdictional statement (pp. 22-3), public confidence in the fairness of antitrust enforcement is indispensable to voluntary compliance with the law in the public interest.

After disclaiming its clearance of the acquisition, the government goes on to make the extraordinary claim that "Burgermeister remained a strong, healthy company and any decline was insignificant." (Mot. p. 13 n. 14) Stipulated facts, however, reveal that from 1955 to the year preceding the acquisition Burgermeister's sales in California, where more than 90 per cent of its beer was sold, declined *47.27 per cent* in relation to total industry sales. (Gov't Mot. pp. 47-50).* Discounting Burgermeister's loss of sales in 1961, as the government proposes (Mot. p. 5 n.4), the decline through 1960 is *33.62 per cent*. It defies understanding how such a loss of position in the "rapidly growing" California market can be characterized as "insignificant" or the company, as "healthy." (Gov't Mot. pp. 3, 13).

Against this backdrop of sharply falling sales, and in light of the Antitrust Division's pre-merger clearance of the acquisition, the government's mechanical invocation of *Von's* and *Pabst* is misplaced.** (Gov't Mot. p. 13 n.14) Those decisions refused to extend their reasoning beyond the "case of two already powerful companies merging in a way which makes them even more powerful than they were before." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 278 (1966). And here, wholly apart from Burgermeister's decline, even "Schlitz was not very successful in

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* Its profits suffered even more. (Juris. St. p. 13)

** *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

selling its premium brand in the large, rapidly growing West Coast beer market"—as the government so cheerfully chides. (Gov't Mot. p. 3)

Nor does the government's argument become any more persuasive when it insists that Burgermeister's waning performance should be dismissed from consideration because "the Miller Brewing Company—whose share of the California market was insignificant—also offered to buy Burgermeister." (Gov't Mot. p. 13 n.13)* The record discloses that in 1961, the year preceding the acquisition, Schlitz sold 283,278 barrels of beer in California and had 3.6 per cent of total sales. In the same year, Miller, "whose share of the California market was insignificant," sold 231,067 barrels and had 3 per cent of total sales, *or .6 per cent less than Schlitz.* (Gov't Mot. p. 50) On top of this, in 1964, the last year of record, Miller sold 382,891 barrels of beer in California and had 4.2 per cent of total sales, or .6 per cent more than Schlitz's 1961 sales. (Gov't Mot. p. 52) Yet slightly more than a year later, with the approval of the Antitrust Division, Miller purchased General Brewing's Azusa brewery, which is one-fifth again as large as the Burgermeister brewery purchased by Schlitz.

What these conundrums reflect, in sum, are the incongruities of the decision below and the corresponding need for plenary review by this Court.

III.

The Error Of The Trial Court's Rulings On Discovery And The Motion To Reopen Stands Out More Clearly Than Before.

Neither motion to affirm can muster any justification for

* On page 3 of the government's motion, Schlitz "was not very successful" in the West; on page 13, it becomes a "principal competitor" of "strong, healthy" Burgermeister.

the trial court's refusal in this complex proceeding to allow discovery by Schlitz with respect to matters constituting a prominent part of the government's case, *i.e.*, the alleged necessity for perpetuating Labatt's control of General Brewing.

Contrary to what is said in the motions to affirm, the discovery requested by Schlitz would have taken place *before* the August 16 trial date and would *not* have delayed the start of trial. (Gov't Mot. pp. 18-9; Gen. Br'g Mot. pp. 24-5) That was made clear to the trial court when the motions were filed. (Tr. 370, 408, 430-31, July 1-2, 1965) Accordingly, if the writer of the government's motion to affirm had examined the record, he would not have made the statement that the trial court denied the discovery sought by Schlitz because "it determined that further postponement of the trial date to allow the depositions to be taken would be unjustified." (Gov't Mot. p. 19)*

Totally without merit is the claim that two depositions taken in a treble-damage case filed against Schlitz by General Brewing gave Schlitz all that it needed. (Gov't Mot. pp. 9, 19 n.21; Gen. Br'g Mot. p. 24) As Schlitz advised the court below (Tr. 269, June 22, 1965) and as the depositions themselves will show, the examination centered around charges of alleged price discrimination. It was not directed at the issue injected into this case by the government's insistence that General Brewing, notwithstanding its near collapse with Labatt at the reins, was potentially a national brewer but required the support of Labatt to succeed in the venture.*

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* General Brewing's allusion (Mot. p. 24) that the trial court's rulings were designed to keep trade secrets out of Schlitz's hands is baseless. The motion requesting production of documents specifically restricted access to counsel. (Tr. 356-57, July 1-2, 1965)

Similarly farfetched is the notion that Schlitz "forfeited" its rights to discovery by the timing of its motions or by adding new counsel. (Gov't Mot. pp. 18-9; Gen. Br'g Mot. pp. 24-5) Simply put, there was no basis at all for the court to rule as it did, irrespective of what had happened in the course of the proceedings before Schlitz filed the motions in question.

Finally, neither the government nor General Brewing can defend the denial of Schlitz's motion to reopen, except by asking this Court to do precisely what the court below did: resolve the contested issues arising from the sale of General Brewing's Azusa brewery to Miller Brewing Company by accepting, without an evidentiary hearing, the naked assertions of General Brewing concerning the sale. (Gov't Mot. p. 10; Gen. Br'g Mot. pp. 18-20) But as this Court cautioned in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962):

> summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute . . . .

Confronted with this dilemma, the government makes the startling suggestion that any delay resulting from a reopening of the record "might prejudice the business interests of Labatt and General Brewing." (Gov't Mot. p. 19) There is no doubt that this consideration influenced the court below. (See Juris. St. pp. 12, 25, 3a-4a) We submit, however, that it is plain error for a court to resolve issues and determine rights by reference to the "business interests" of a non-party and its puppet.

IV.

The Findings Of Fact And Conclusions Of Law Entered By The Trial Judge Are Simply Not His Own.

As shown in the jurisdictional statement (pp. 19, 26-7), the trial court decided the hotly contested issues generated by this case in an opinion borrowed virtually verbatim from findings of fact and conclusions of law prepared by the government. The government and General Brewing both try to eschew this fact by pointing to the court's protest that it carefully prepared its own findings and conclusions. (Gov't Mot. p. 20; Gen. Br'g Mot. p. 33) But this is not a matter for polite presumptions. Looking to what the trial judge did, a comparison of the findings and conclusions actually entered with those proposed by the government will verify that they are virtually identical.

Whether the trial court's adoption of findings and conclusions prepared by one of the parties is a ground for reversal is not the issue here.* Nevertheless, since cases such as this are subject only to direct review, the failure of the trial court to prepare its own findings and conclusions is an additional reason for this Court to review the correctness of the decision below and the essential fairness of the way in which it was reached. Cf. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 (1963); *International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950).

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* The decision in *El Paso* indicates that it is not an independent ground. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964).

Conclusion

We respectfully urge that probable jurisdiction be noted so that the questions presented may be heard on the merits, lest Schlitz be "deprived of any appellate review." *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 (1963).

Respectfully submitted,

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October 19, 1966

APPENDIX FOLLOWS

APPENDIX

The following is the telegraphic response of Schlitz to the telegram reproduced at page 9 of General Brewing's Objections to Motion to File Amici Curiae Brief:.

> To Paul Kalmanovitz Report Delivery Sept. 2, 1965 Address Maier Brewing Company, Los Angeles, California
>
> As you well know, no promises or guarantees of any kind have been made by Schlitz or its representatives regarding the possible disposition of General Brewing Corporation. Our recent discussion with you concerned solely your appearance as a witness in United States versus Schlitz. Your request for a commitment with respect to General Brewing was unequivocally turned down by Mr. Archer and myself. I advised Mr. Lyle Jones yesterday of your telegram and the circumstances surrounding it. I delayed answering your telegram until today because, as a result of my telephone conversation with your lawyer, it was my understanding that you were to send a retraction. Joseph DuCoeur